

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MELVIN JONES, JR.,

Charging Party,

v.

COUNTY OF SANTA CLARA,

Respondent.

Case No. SF-CE-646-M

Request for Reconsideration

PERB Decision No. 2267b-M

November 27, 2012

Appearances: Melvin Jones, Jr., on his own behalf; Cheryl A. Stevens, Deputy County Counsel, for County of Santa Clara.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration filed by Melvin Jones, Jr. (Jones) of the Board's decision in *County of Santa Clara* (2012) PERB Decision No. 2267-M. In that decision, the Board adopted the decision of an administrative law judge (ALJ) dismissing Jones's unfair practice charge and complaint for failure to state a prima facie case that the County of Santa Clara (County) violated the Meyers-Milias-Brown Act (MMBA)¹ by:

- (1) terminating his employment in retaliation for having engaged in protected activity;
- (2) denying him the right to have an employee organization representative present at a meeting; and
- (3) interfering with protected rights.

A prior request for reconsideration was denied by the Board on August 2, 2012, PERB Decision No. 2267a-M.

¹ The MMBA is codified at Government Code section 3500 et seq. Unless otherwise noted, all statutory references are to the Government Code.

The Board has reviewed the request and supporting documentation, and the response thereto, in light of the relevant law. Based on this review, the Board denies Jones's second request for reconsideration for the reasons discussed below.²

PROCEDURAL HISTORY

On April 20, 2009, Jones filed an unfair practice charge alleging, *inter alia*, that the County terminated his employment in retaliation for having engaged in protected activity, in violation of the MMBA. Following issuance of a complaint by the PERB Office of the General Counsel, a PERB ALJ conducted a two-day hearing on the merits of the complaint, during which Jones was afforded the opportunity to present evidence in support of his claims. On February 11, 2011, the ALJ issued a proposed decision recommending that the complaint and charge be dismissed for failure to establish a violation of the MMBA. Jones appealed that determination by filing exceptions with the Board pursuant to PERB Regulation 32300.³ On May 25, 2012, the Board adopted the ALJ's proposed decision as its decision in this case. In its decision, the Board expressly addressed Jones's request to consider additional evidence, including an April 24, 2009 pay warrant that Jones contended established that he was granted 56 hours of leave without pay in April 2009.⁴ Applying the standard set forth in PERB Regulation 32410(a) for a request for reconsideration based on the discovery of new evidence (*State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S), the Board determined that Jones failed to establish proper grounds for

² On November 17, 2012, Jones submitted a "Reply" to the County's response to the request for reconsideration and a request for oral argument. PERB regulations do not allow for the filing of reply briefs or oral argument regarding a request for reconsideration. Accordingly, the Board has not considered this document.

³ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

⁴ In the underlying case, Jones contended that the County wrongly terminated his probationary employment based upon allegations that he was absent without leave.

consideration of that evidence. On August 2, 2012, the Board considered and denied a request for reconsideration based, in part, upon the same evidence.

Between April 23, 2012 and October 8, 2012, Jones filed four separate requests for injunctive relief, pursuant to MMBA section 3541.3(j) and PERB Regulation 32450, asking PERB to go to court to request injunctive relief against the County. The Board denied all of these requests.⁵

On October 16, 2012, Jones filed a request that the Board grant a new hearing to consider newly discovered evidence. Attached to that request are the following documents: (1) an April 29, 2009 Notice of Probationary Release; (2) a page from a brief apparently filed by the County in response to one of Jones's requests for injunctive relief; (3) an excerpt from a memorandum of understanding; (4) the April 24, 2009 pay warrant; (5) an excerpt from the ALJ's proposed decision in this case; and (6) an e-mail dated April 10, 2009. Accompanying the request is a declaration under penalty of perjury signed by Jones stating that, on or about April 26, 2012, he discovered new evidence in the form of an "admission made in writing" by the County's attorney in an opposition to one of Jones's requests for injunctive relief (PERB Injunctive Relief Request No. 618). While not entirely clear, it appears that the "newly discovered" evidence Jones seeks to introduce is the following statement contained in the County's brief in opposition to the injunctive relief request: "Construed most favorably toward Jones, the circumstances of his release suggest that Jones was the victim of his own misunderstanding about his right to be on leave without a medical release." According to Jones, this statement constitutes an "admission" by the County that he was granted a leave of

⁵ In addition, on August 8, 2012, Jones filed a new unfair practice charge alleging that the County adopted and enforced an unreasonable local rule and made a unilateral change when it admitted that it had placed Jones on a leave of absence without pay in 2009. (PERB Case No. SF-CE-998-M.) Following dismissal of that charge by the Office of the General Counsel, Jones appealed the dismissal to the Board and then requested that it be withdrawn. That request is addressed in a separate Board decision.

absence without pay and, therefore, was improperly terminated. On October 19, 2012, Jones submitted an additional document asserting that his October 16, 2012 filing inadvertently omitted a document containing the County's leave of absence policy.

By letter dated October 25, 2012, the PERB Appeals Assistant notified the parties that Jones's October 16, 2012, request for a new hearing on the basis of newly discovered evidence would be treated as a request for reconsideration and afforded the County twenty days to file a response. The County filed a timely response on November 14, 2012.

DISCUSSION

In his request that the Board grant a new hearing, Jones requests reconsideration on the basis of newly discovered evidence. Accordingly, we consider his request as a request for reconsideration pursuant to PERB Regulation 32410(a).

As set forth in both the Board's decision on the merits as well as its decision in Jones's first request for reconsideration, requests for reconsideration of a final Board decision are governed by PERB Regulation 32410(a), which permits a party to a decision by the Board to file a request for reconsideration within 20 days following the date of service of the decision. Regulation 32410(a)(2) further requires a party seeking reconsideration based upon the discovery of new evidence to submit a declaration under penalty of perjury establishing that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Timeliness

The instant request for reconsideration was filed on October 16, 2012, nearly five months after the Board issued its final decision on the merits on May 25, 2012, and more than

two months after it issued its decision denying his first request for reconsideration on August 2, 2012. Therefore, because it was not filed within 20 days after service of either of the Board's decisions, it is untimely and must be denied on that basis alone.

Grounds for Reconsideration

Even if we were to consider the second request for reconsideration as timely filed, we would find that the request fails to establish grounds for reconsideration based upon the discovery of new evidence. In essence, Jones seeks to revive his claim that he was wrongfully terminated from his probationary period for having been absent without leave. The purported "new evidence" is not evidence at all, but simply a statement made in argument. Moreover, even if considered as an evidentiary statement, it does not establish the fact Jones seeks to prove that the County granted him a leave of absence without pay. Even if it did, it would not impact or alter the underlying decision in this case finding that the County did not terminate Jones's employment in retaliation for having engaged in protected activity. Accordingly, the Board denies the second request for reconsideration because it fails to establish grounds for reconsideration pursuant to PERB Regulation 32410(a).

ORDER

The request of Melvin Jones, Jr., for reconsideration of the Public Employment Relations Board's decision in *County of Santa Clara* (2012) PERB Decision No. 2267-M is hereby DENIED.

Chair Martinez and Member Huguenin joined in this Decision.